[ORAL ARGUMENT NOT YET SCHEDULED]

No. 09-5293

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the matter of: ALPINE PCS, INC.

ALPINE PCS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

INITIAL BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties. The parties before this Court are Alpine PCS, Inc., Appellant; and the Federal Communications Commission, Appellee.

B. Rulings Under Review. The rulings under review are the district court's amended memorandum and order dated July 22, 2009, by Judge J. Frederick Motz, sitting by designation on the United States District Court for the District of Columbia, and the bankruptcy court's memorandum decision dated October 10, 2008 and oral decision of August 21, 2008, both by Judge S. Martin Teel, Jr., of the United States Bankruptcy Court for the District of Columbia.

C. Related Cases. This case has not previously come before this Court or any other court. A related case, *Alpine PCS, Inc.* v. *FCC*, has been docketed in this Court as Case No. 10-1020.

D. Deferred Appendix. A deferred appendix is being used, pursuant to this Court's Order of March 30, 2010.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran

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GLOSSARY

Alpine	Alpine, PCS, Inc.
APA	Administrative Procedure Act
FCC	Federal Communications Commission
JA	Joint Appendix
Grace Period Order	*In the Matter of Amendment of Part I of the Commission's Rules — Competitive Bidding Procedures*, 13 FCC Rcd 374 (Dec. 18, 1997)
Reconsideration Denial Order	*In the Matter of Alpine PCS, Inc., et al.*, 25 FCC Rcd 469, 2010 WL 25778 (Jan. 5, 2010)
Stay Denial Order	*In the Matter of Alpine, PCS, Inc*., 23 FCC Rcd 10485 (July 7, 2008)
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STATEMENT OF JURISDICTION

Appellant Alpine PCS, Inc. ("Alpine") filed its petition commencing this bankruptcy case on August 12, 2008, and immediately sought a declaration that the automatic stay of 11 U.S.C. § 362(a) barred appellee, the Federal Communications Commission ("FCC"), from auctioning licenses to use radio spectrum previously covered by licenses purchased by Alpine. Exercising its jurisdiction under 28 U.S.C. § 157(b), the bankruptcy court denied the motion on October 10, 2008. Joint

Appendix ("JA") __-__ (Bankr. Ct. Op.). Alpine appealed to the United States District Court for the District of Columbia, which had jurisdiction to adjudicate the appeal pursuant to 28 U.S.C. § 158(a). The district court affirmed the bankruptcy court's order on July 22, 2009, JA __ (Dist. Ct. Op.), and Alpine filed its Notice of Appeal of that decision on August 19, 2009, JA __ (Notice of Appeal).

On January 14, 2010, this Court directed the parties to address in their briefs whether the bankruptcy court order under review is sufficiently final to establish appellate jurisdiction under 28 U.S.C. § 158(d). The government believes that section 158(d)'s finality requirement is satisfied here. Finality "is given a flexible interpretation in bankruptcy" because "bankruptcy cases typically involve numerous controversies bearing only a slight relationship to each other." *In re Northwood Properties, LLC*, 509 F.3d 15, 21 (1st Cir. 2007); *see also, e.g.*, *In re Smith*, 582 F.3d 767, 776 (7th Cir. 2009); *In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008); *In re Flor*, 79 F.3d 281, 283 (2d Cir. 1996).

To be final, "a bankruptcy order need not resolve all of the issues in the proceeding, but it must finally dispose of all the issues pertaining to a discrete dispute within the larger proceeding." *In re Perry*, 391 F.3d 282, 285 (1st Cir. 2004). In other words, in the bankruptcy context, "the relevant judicial unit for application of the finality rule is not the overall bankruptcy case, but rather the particular adversary

proceeding or discrete controversy pursued within the broader framework cast by the petition." *In re Tri-Valley Distributing, Inc.*, 533 F.3d 1209, 1214 (10th Cir. 2008) (internal quotation omitted); s*ee also In re Atlas*, 210 F.3d 1305, 1308 (11th Cir. 2000) (observing that a bankruptcy court order is final if it "completely resolve[s] all of the issues pertaining to a discrete claim"). Similarly, although the government is not aware of any decisions of this Court defining finality for the purpose of bankruptcy cases, *Saravia* v. *1736 18th Street, N.W., Ltd. Partnership*, 844 F.2d 823, 825-26 note (D.C. Cir. 1988), cites with approval the proposition that "interlocutory orders may be appealed under § 158(d) if the nature of the ruling and the factual circumstances suggest that, for purposes of the particular matter resolved in the order, it is . . . sufficiently final to support our jurisdiction."

Here, the discrete dispute is whether the Bankruptcy Code prohibited the FCC from conducting an auction to sell licenses for the use of radio spectrum that was previously covered by Alpine's licenses. Having found no basis for Alpine's challenge to the auction, the bankruptcy court and district court both issued sufficiently final orders to establish this Court's appellate jurisdiction under 28 U.S.C. § 158(d).

The government notes, however, that the bankruptcy court did not have jurisdiction under section 157(b) to review the reasonableness of the FCC's

regulatory framework or the FCC's decisions regarding the automatic cancellation of Alpine's licenses for non-payment. Those issues may be raised properly only in Case No. 10-1020, Alpine's administrative challenge to the FCC's denial of Alpine's request for waiver of the automatic cancellation rule. *See* 47 U.S.C. § 402(b) (requiring that parties challenging final FCC licensing orders file for judicial review directly in this Court); *In re FCC*, 217 F.3d 125, 136-39 (2d Cir. 2000) (explaining that the reasonableness of the FCC's automatic cancellation and auctioning decisions is outside the jurisdiction of the bankruptcy court because "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals" under 47 U.S.C. § 402); *NextWave Personal Communications, Inc.* v. *FCC*, 254 F.3d 130, 138-39 (D.C. Cir. 2001), *affirmed*, *FCC* v. *NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) (adjudicating NextWave's bankruptcy-law challenge to the FCC's automatic cancellation decision pursuant to an appeal filed under section 402(b)). Unless and until the FCC's decision to deny Alpine's request for waiver of automatic cancellation is reversed, the Commission's determination that the licenses canceled is not subject to challenge in this bankruptcy case. *See In re FCC*, 217 F.3d at 136-37 ("[A] regulatory condition is a regulatory condition even if it is arbitrary. It is for the FCC to state its conditions of licensure, and for a court with power to review the FCC's decisions to say if they are arbitrary or valid."); *NextWave*, 254 F.3d at 139.

Accordingly, appellate review in the district court and this Court is limited to whether, in light of those FCC decisions, the bankruptcy court correctly concluded that, under section 541 of the Bankruptcy Code, the licenses were not part of Alpine's bankruptcy estate, and that section 362's automatic stay therefore had no application to the challenged auction.

STATEMENT OF THE ISSUES

1. Whether the bankruptcy court and district court correctly concluded that, under section 541 of the Bankruptcy Code, Alpine's bankruptcy estate does not include Alpine's previously held licenses to use certain radio spectrum because those licenses automatically canceled years before Alpine filed its bankruptcy petition.

2. Whether the bankruptcy court and district court correctly concluded that the Bankruptcy Code's automatic stay provision has no application to the FCC's auction of licenses to use radio spectrum previously covered by Alpine's licenses.

STATUTES AND REGULATIONS

All pertinent statutes and regulations not already included in the addendum to the brief for appellant are set forth in the addendum to this brief.

STATEMENT OF THE CASE

In 1996, following an auction in which Alpine was the winning bidder, the FCC issued two licenses authorizing Alpine to use certain radio spectrum to provide wireless communications services. Alpine agreed to pay most of its winning auction bids in installments. The licenses specified that failure to comply with the installment payment schedule "will result in automatic cancellation of this authorization." JA __, __ (Licenses at 2). In January 2002, Alpine failed to make its required installment payments. Pursuant to FCC regulations, Alpine automatically received a grace period of two calendar quarters terminating on July 31, 2002. 47 C.F.R. §§ 1.2110(g)(4)(i) and (ii). Alpine failed to pay its overdue installments by that date. In such circumstances, FCC regulations provide that "[i]f an eligible entity obligated to make installment payments [for a license obtained at auction] fails to pay [within the prescribed time period] . . ., it shall be in default [and] its license shall automatically cancel . . . ." *Id.* § 1.2110(g)(4)(iv).

On July 31, 2002, Alpine filed a request with the FCC seeking to extend the time for its payments and requesting a waiver of the operation of the automatic cancellation regulation. The Commission's staff subsequently denied that request, reiterating that the licenses canceled on August 1, 2002, and explaining that Alpine failed to demonstrate the extraordinary circumstances necessary to support the grant

of a waiver. *See* JA __ (*In the Matter of Alpine PCS, Inc.* ("Waiver Denial Order"), 22 FCC Rcd 1492, 1492 (Jan. 29, 2007)). While Alpine's petition for administrative reconsideration of the FCC's waiver denial was still pending, Alpine commenced this bankruptcy case. Alpine filed an emergency motion requesting that the bankruptcy court prohibit the FCC from conducting a public auction for licenses to use spectrum that previously was subject to Alpine's licenses. Alpine argued that because it was still seeking administrative review of the agency's denial of its request to waive cancellation of the licenses, the licenses were property of Alpine's estate and thus protected from cancellation under section 362(a) of the Bankruptcy Code. The bankruptcy court denied the motion, explaining that the applicable regulations "made clear that once the two automatic grace periods (which ended as to Alpine on July 31, 2002) were past, and Alpine failed to bring its payments current, '[it] shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures.'" JA __ (Bankr. Op. at 6 (quoting 47 C.F.R. § 1.2110(g)(4)(iv))). Because the bankruptcy proceedings did not commence until long after the licenses had canceled, the court concluded that the canceled licenses were not property of Alpine's bankruptcy estate under 11 U.S.C. § 541, and thus the challenged auction of other licenses to use the same spectrum did not violate section 362(a). Alpine appealed to the United States District Court for the District of Columbia, which

affirmed on the same grounds. JA __ (Dist. Ct. Op.). Alpine now seeks review of that decision in this Court. JA __ (Notice of Appeal).

While this appeal was pending, the FCC denied Alpine's motion for reconsideration of the agency's 2007 decision denying Alpine's request for waiver of the automatic cancellation rule. JA __-__ (*In the Matter of Alpine PCS, Inc., et al.* ("Reconsideration Denial Order"), 25 FCC Rcd 469, 2010 WL 25778 (Jan. 5, 2010)). In another appeal presently pending before this Court, Case No. 10-1020, Alpine seeks vacatur and reversal of the agency's denial of its waiver request as arbitrary, capricious, and contrary to law.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Communications Law

The Communications Act of 1934, as amended, establishes a system for licensing the use of radio spectrum, 47 U.S.C. § 301, and vests in the FCC the exclusive authority to grant spectrum licenses where the agency finds that the "public convenience, interest, or necessity will be served thereby." *Id.* § 307(a); *see also id.* § 309(a). The Act makes clear that a license affords no property interest in the underlying spectrum, which remains subject to the control of the United States. *See id.* § 301 (an FCC license "provide[s] for the use of such channels, but not the

ownership thereof, by persons for limited periods of time, . . . and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license").

Congress has authorized the allocation of certain spectrum licenses through a system of "competitive bidding," or auction, in which the license is awarded to the highest qualified bidder. *See* 47 U.S.C. § 309(j). The Act dictates that all auction proceeds shall be deposited in the Treasury of the United States or used to cover certain costs of the FCC. *See id.* § 309(j)(8).

Congress emphasized that the reliance on market forces (inherent in an auction process) was intended to enhance the FCC's authority to regulate the use of spectrum in the public interest. 47 U.S.C. § 309(j)(6)(A) (statutory authorization for auctions must not be construed to "alter spectrum allocation criteria and procedures established by the other provisions of [the Communications Act]"). In particular, Congress made clear that the auction mechanism must not be invoked to "diminish the authority of the Commission under the other provisions of [the Act] to regulate or reclaim spectrum licenses"; nor shall the statutory auction authority "be construed to convey any rights . . . that differ from the rights that apply to other licenses." *Id.* §§ 309(j)(6)(C), (D); *see also, e.g.*, *Celtronix Telemetry, Inc.* v. *FCC*, 272 F.3d 585 (D.C. Cir. 2001)

(rejecting licensee's argument that auction conferred contractual rights limiting FCC's regulatory authority).

Section 309(j) requires the FCC to design auctions that "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). In accordance with that directive, the FCC took steps to provide advantages for small, entrepreneurial companies known as "designated entities," including providing liberal terms for payment of their winning bids. Pursuant to FCC regulations in place when Alpine purchased its licenses, designated entities were allowed to pay only a percentage of their winning bids at the time of the license grant, with the remaining balance to be paid in installments over the ten-year license term at below-market interest rates. 47 C.F.R. § 1.2110(e) (1994).

Since the installment payment program was adopted in 1994, FCC regulations have consistently and expressly provided that failure to make timely payment triggers automatic cancellation of the license. *See* 47 C.F.R. § 1.2110(g)(4) (2001) ("A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of [the entity's] payment obligations under the installment plan."); *id.* § 1.2110(g)(4)(iv) (stating that if a licensee fails to meet its

payment obligations, its license "shall automatically cancel"); *see also* 47 C.F.R. § 1.2110(b)(4)(iii) (1994); 47 C.F.R. § 1.2110(f)(4)(1998); *In re FCC*, 217 F.3d 125, 132 (2d Cir. 2000) (describing the automatic cancellation rule). The automatic cancellation rule also appears on the face of the licenses, which "condition [the licenses' existence] upon the full and timely payment of all monies due pursuant to . . . the terms of the FCC's installment agreement" and specifically state that "[f]ailure to comply with this condition will result in the automatic cancellation of this authorization." JA __, __ (Licenses at 2).

Initially, FCC rules provided that licensees could request a grace period for installment payments, which the Commission would grant or deny on a case-by-case basis. *See* 47 C.F.R. § 1.2110(e)(4)(ii) (1994). In order to give licensees more certainty in the installment payment process, the FCC revised its rules in 1997 to replace the individualized grace period request process with two automatic grace periods totaling 180 days (or two calendar quarters). *See* 47 C.F.R. § 1.2110(g)(4)(iv); JA __-__ (*In the Matter of Amendment of Part I of the Commission's Rules — Competitive Bidding Procedures* ("Grace Period Order"), 13 FCC Rcd 374, 434-43 (Dec. 18, 1997). In promulgating the regulation providing for two automatic grace periods, the agency repeatedly explained that, under the revised rules, if a licensee fails to make the required payment prior to the expiration of the grace periods, its

license will "automatically cancel . . . without further action by the Commission." JA __ (Grace Period Order, 13 FCC Rcd at 437); *see also* JA __, __, __ (Grace Period Order, 13 FCC Rcd at 438, 441, 442).

The Commission has general authority under 47 C.F.R. § 1.925 to waive rules relating to wireless radio service applications where (1) "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest," or (2) "[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." Pursuant to this authority, the Commission will adjudicate requests by licensees to suspend the automatic cancellation rule. *See* JA __-__ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *9). The Commission will grant, however, only those requests where "the defaulting parties affirmatively demonstrate that they have the ongoing ability and willingness to fulfill their payment obligation by, for instance, promptly paying the accelerated debt in full or by making continuing post-default payments with an unconditional promise to pay their accelerated debt in accord with the Commission's payment terms." JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *9) (also observing that "the Commission has never granted

a waiver of the automatic cancellation rule where a party has ceased making post-default payments towards its outstanding debt obligation").

To help protect the FCC's additional rights as a creditor, the FCC required licensees to execute a Note for the outstanding unpaid balance of the winning bid at the auction, as well as a Security Agreement. *See Leonard J. Kennedy, Esq.*, 11 FCC Rcd 21572 (Dec. 17, 1996) (describing the purpose of the Note and Security Agreement). Both the Note and the Security Agreement reiterate that a license's existence is conditioned upon full and timely payment under the installment payment plan. JA __, __ (Notes at 3); JA __-__ (Security Agreements at ¶ 8(a)). The Security Agreement serves to assure that the FCC remains the prime secured creditor for the outstanding auction debt as long as the licenses remain in existence, and the Security Agreement gives the FCC a priority first secured claim to the proceeds of any sale of the license by the licensee. *See Leonard J. Kennedy, Esq.*, 11 FCC Rcd at 21572; *MLQ Investors, L.P.* v. *Pacific Quadracasting, Inc*., 146 F.3d 746 (9th Cir. 1988). However, the Security Agreement is not in derogation of the FCC's regulatory powers to cancel licenses pursuant to the FCC's regulations. Upon cancellation, the license "disappears," and there are no proceeds because there is no collateral to liquidate. *Leonard J. Kennedy, Esq.*, 11 FCC Rcd at 21576.

B. Bankruptcy Law

The commencement of a bankruptcy case creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition operates as an automatic stay of, among other things, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," "any act to create, perfect, or enforce any lien against property of the estate," and "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title." *Id.* §§ 362(a)(3)-(5). Bankruptcy courts have consistently recognized that the automatic stay is not violated by post-petition disposition of property in which the debtor has ceased, as of its petition date, to have any interest. *See, e.g.*, *In re Mellino*, 333 B.R. 578, 586-87 (Bankr. D. Mass. 2005); *In re Brettschneider*, 322 B.R. 606, 610 (Bankr. D. S.C. 2005); *In re Longmire*, 311 B.R. 203, 205 (Bankr. S.D. Ohio 2003); *In re Kingsport Ventures, L.P.*, 251 B.R. 841, 849 (Bankr. E.D. Tenn. 2000); *In re Alcom America Corp.*, 156 B.R. 873, 876, 882, 884 (Bankr. D. D.C. 1993).

II. Factual and Procedural Background

In 1996, Alpine was the winning bidder at an auction for two FCC licenses to use certain radio spectrum to provide wireless communications services. Alpine agreed to pay most of its winning auction bid for each license in installments. To acknowledge that payment obligation, Alpine issued to the FCC a Note for each of the two winning bids. JA __-__, __- __ (Notes). It also executed two companion Security Agreements in which it pledged the licenses to the FCC to secure payment under the Notes. JA __-__, __-__ (Security Agreements).

The licenses expressly "conditioned [the licenses' existence] upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the Licensee." JA __, __ (Licenses at 2). The licenses stated that "[f]ailure to comply with this condition will result in the automatic cancellation of this authorization." JA __, __ (Licenses at 2). In its Notes, Alpine "acknowledge[d]" that the licenses were "conditioned upon full and timely payment of financial obligations under the [FCC's] installment payment plan, as set forth in the then-applicable orders and regulations of the Commission . . . ." JA __, __ (Notes at 3). The Security Agreements also reiterated that, in the event of default, "the License[s] shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." JA

__, __ (Security Agreements at ¶ 8(a)). In addition, Alpine "acknowledge[d]" in the Security Agreements that it held "a mere conditional license to use the Spectrum with no ownership interest in the Collateral (or any underlying right to use the Spectrum) . . . ." JA __, __ (Security Agreements at ¶ 2).

The Security Agreements and Notes incorporate by reference the current version of FCC regulations, and any subsequent changes to the regulations. Specifically, the Security Agreements state, "Nothing in this Agreement shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Agreement shall be deemed to release [Alpine] from compliance therewith." JA __, __ (Security Agreements at ¶ 3). The Notes likewise provide that they "shall be governed by and construed in accordance with the Communications Act of 1994, as amended, the then-applicable orders and regulations of the Commission, and federal law. Nothing in this Note shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Note shall be deemed to release the Maker from compliance therewith." JA __, __ (Notes at 6).

In January 2002, Alpine failed to make its required installment payments. Pursuant to FCC regulations, Alpine was given two automatic quarterly "grace periods" — until July 31, 2002 — to pay the missed installments plus interest. 47 C.F.R. § 1.2110(g)(4)(i) and (ii). On July 24, 2002, Alpine submitted a request for

"debt restructuring" to the FCC Office of Managing Director pursuant to 31 C.F.R. § 902.2 (which concerns debt forgiveness). JA __-__ (Request for Restructuring of Debt (July 29, 2002), Bankr. Ct. Docket #27). On July 31, 2002, the last day of the second grace period, Alpine filed a request with the FCC seeking waiver of the automatic cancellation rule. JA __-__ (Request for Waiver (July 31, 2002), Bankr. Ct. Docket #25). Because Alpine did not make the required installment payment, its licenses automatically canceled, without further action by the FCC, on August 1, 2002. *See* 47 C.F.R. § 1.2110(g)(4)(iv) ("If an eligible entity obligated to make installment payments [for a license obtained at auction] fails to pay [within the prescribed time period] . . . , it shall be in default [and] its license shall automatically cancel . . . ."); JA __ (Waiver Denial Order, 22 FCC Rcd at 1492).

After considering Alpine's debt restructuring request, the FCC rejected the request on January 30, 2004. JA __-__ (Letter from FCC Office of General Counsel to Alpine President Robert Broz (Jan. 30, 2004), Bankr. Ct. Docket #34). Alpine sought no further review of the FCC's action on that request. On January 29, 2007, the FCC denied Alpine's request for waiver of the automatic cancellation rule, reiterating that the licenses had automatically canceled on August 1, 2002, and further explaining that Alpine failed to demonstrate the extraordinary circumstances necessary to support the grant of a waiver. JA __ (Waiver Denial Order, 22 FCC Rcd at 1502-

03). On February 28, 2007, Alpine filed a motion for reconsideration of the waiver denial.

On April 4, 2008, the FCC announced a public auction of various licenses, including licenses for the use of spectrum that Alpine previously had licenses to use. On April 18, 2008, Alpine filed a request to stay the auction, which the FCC denied on July 7, 2008. JA __-__ (*In the Matter of Alpine PCS, Inc.* ("Stay Denial Order"), 23 FCC Rcd 10485 (July 7, 2008)). On August 13, 2008, the FCC began the auction, in which it offered new licenses for rights to use the radio spectrum in various geographic territories, including territory formerly licensed to Alpine. JA __, __ (Declaration of Margaret W. Wiener, Bankr. Ct. Docket #44). The auction thus commenced more than six years after Alpine's licenses automatically canceled pursuant to 47 C.F.R. § 1.2110(g)(4)(iv), and nineteen months after the FCC denied Alpine's request to waive operation of the regulation. On August 20, 2008, the auction closed, with winning bids submitted on 53 licenses, including some to use the spectrum formerly covered by Alpine's licenses. The administrative proceeding which will determine whether the FCC will issue licenses to the winning bidder of that spectrum remains pending because, among other things, Alpine challenged the winning bidder's right to receive licenses for the use of that spectrum.

On August 12, 2008 — the day before the scheduled date for the public auction — Alpine commenced its bankruptcy case. Alpine then filed an emergency motion requesting that the bankruptcy court prohibit the FCC from issuing licenses to use the spectrum that previously was the subject of Alpine's licenses. Alpine argued that because it sought administrative review of the agency's denial of its request to waive cancellation of its licenses, the licenses had not canceled and were property of Alpine's estate, protected from foreclosure by section 362(a) of the Bankruptcy Code. The bankruptcy court denied the motion, explaining that the applicable regulations "made clear that once the two automatic grace periods (which ended as to Alpine on July 31, 2002) were past, and Alpine failed to bring its payments current, '[it] shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures.'" JA __ (Bankr. Op. at 6 (quoting 47 C.F.R. § 1.2110(g)(4)(iv))). Because the bankruptcy proceedings did not commence until well after the licenses canceled, the court concluded that the licenses were not part of Alpine's bankruptcy estate, and thus the auctioning of licenses to use that portion of the spectrum did not violate the Bankruptcy Code's automatic stay. JA __ (Bankr. Op. at 2).

Alpine appealed to the United States District Court for the District of Columbia, which affirmed on the same grounds. JA __ (Dist. Ct. Op.). On August 18, 2009, Alpine filed a notice of appeal with this Court. JA __ (Notice of Appeal).

On January 5, 2010, the FCC denied Alpine's motion for reconsideration of the agency's denial of Alpine's request for waiver of the automatic cancellation rule. JA __-__ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778). The FCC specifically rejected Alpine's contention that its waiver request tolled operation of the automatic cancellation rule. JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *21). On February 4, 2010, Alpine filed a notice of appeal with this Court pursuant to section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b)(5). In that appeal, Case No. 10-1020, Alpine asks this Court to vacate and reverse the agency's denial of its waiver request as arbitrary, capricious, and contrary to law.

On March 5, 2010, the FCC filed a Motion to Hold in Abeyance in the present case, notifying the Court that both this case and Case No. 10-1020 involve the question whether the agency properly determined that Alpine's licenses automatically canceled under 47 C.F.R. § 1.2110(g)(4) due to Alpine's failure to make installment payments. On March 30, 2010, the Court ordered that this case be scheduled for argument on the same day and before the same panel as Case No. 10-1020.

SUMMARY OF ARGUMENT

The bankruptcy court and district court properly rejected Alpine's claim that the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a), prohibits the FCC's efforts to auction licenses to use radio spectrum previously covered by Alpine's licenses. Alpine's licenses automatically canceled on August 1, 2002, six years before Alpine filed its bankruptcy petition and, as such, the licenses are not part of Alpine's bankruptcy estate under 11 U.S.C. § 541. When Alpine received its licenses in 1996, it agreed to pay most of its winning auction bids in installments. FCC rules have always conditioned the grant of licenses upon the full and timely performance of payment obligations, and have provided that, upon a licensee's failure to make a required installment payment, the license will automatically cancel. The automatic cancellation rule was also reiterated in the terms of Alpine's licenses and in the Security Agreements and Notes that Alpine executed. Accordingly, when Alpine ceased making its installment payments on January 31, 2002 and failed to meet its payment obligations by the end of the automatic grace periods provided by 47 C.F.R. § 1.2110(g)(4)(iv), its licenses automatically canceled without any action by the FCC.

Alpine's claim that it still retained the licenses at the time of the bankruptcy petition rests entirely on its contention that it prevented cancellation from occurring by merely filing a request on the day before cancellation was to occur asking the FCC

to waive operation of the automatic cancellation rule. That argument is unsupportable. FCC precedent is clear that the pendency of a waiver request does not toll automatic cancellation. Nor do Alpine's Notes support that argument. The Notes contemplate only that default may be delayed if "any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission." JA __, __ (Notes at 2-3). Alpine already had the benefit of the two automatic grace periods provided by FCC regulations in 2002, when Alpine stopped making installment payments. The applicable orders and regulations made clear that once those grace periods passed without payment, the licensee would be in default and the licenses would automatically cancel. There is no support in the FCC's orders or regulations for Alpine's assertion that it was entitled to an additional grace period triggered by filing a waiver request under a "pre-existing" individualized grace period request process. Indeed, the FCC's Grace Period Order rejects such an argument. Simply put, Alpine cannot point to any textual basis for its assertion that the mere pendency of a request for waiver of automatic cancellation precludes automatic cancellation from occurring.

Given that Alpine's licenses canceled long before Alpine filed for bankruptcy, the Bankruptcy Code's automatic stay provision has no application to the FCC's challenged auction. The automatic stay applies to the debtor's legal and equitable

interests in property at the time the bankruptcy petition is filed, *see* 11 U.S.C. §§ 362(a), 541(a)(1), and thus is not violated by post-petition disposition of property in which the debtor has ceased, as of its petition date, to have any interest. Nor can Alpine demonstrate that the auction constituted an attempt by the FCC to "create, perfect, or enforce" a lien in violation of the automatic stay. Cancellation terminated Alpine's licenses — they no longer existed once canceled. Accordingly, beyond that point, Alpine had no further rights to use the underlying spectrum, and no rights in connection with the subsequent auction of licenses for that spectrum. Alpine's contrary position is precluded by the Communications Act, which specifically states that a licensee has no property right to the underlying radio spectrum, and that the only rights obtained by a licensee are those identified by the license itself and set forth in the FCC's regulations. *See* 47 U.S.C. § 301. Once those licenses ceased to exist, Alpine had no further rights in them.

STANDARD OF REVIEW

"'When a court of appeals hears an appeal from an order of a district court that resolved an appeal from an order of the bankruptcy court, the court of appeals 'sits as a second court of review and applies the same standards as the district court.'" *Greater Southeast Community Hospital Foundation, Inc.* v. *Potter*, 586 F.3d 1, 4 (D.C. Cir. 2009) (quoting 1 Collier on Bankruptcy ¶ 5.11 (15th ed. rev. 2009)). The

bankruptcy court's legal conclusions are subject to de novo review, while the bankruptcy court's factual findings may be reversed only if they are clearly erroneous. *See McGuirl* v. *White*, 86 F.3d 1232, 1234 (D.C. Cir. 1996).

Alpine's challenge in this case rests largely on its assertion that the FCC has incorrectly interpreted its own orders and regulations. As explained in the Jurisdictional Statement, *see supra* pp. 3-5, the FCC's regulatory decisions are not subject to challenge in this bankruptcy appeal; rather, those determinations are subject to this Court's review in Case No. 10-1020. In any event, this Court has explained that "[t]he FCC's interpretation of its own orders and rules is entitled to substantial deference, just as an agency's interpretation of one of its own regulations commands substantial judicial deference." *NetworkIP, LLC* v. *FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008) (internal quotation omitted); *see also Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of its own regulations must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation).

ARGUMENT

I. The Bankruptcy Court And District Court Correctly Concluded That Alpine's Bankruptcy Estate Does Not Include Alpine's Previously-Held Licenses To Use Certain Radio Spectrum Because Those Licenses Automatically Canceled Before Alpine Filed Its Bankruptcy Petition

The filing of a bankruptcy petition creates an estate comprised of "all legal or equitable interests of the debtor in property *as of the commencement of the case*." 11 U.S.C. § 541(a)(1) (emphasis added). In other words, the bankruptcy estate includes only the legal or equitable interests of the debtor in property at the time the bankruptcy petition is filed. *In re Pettit*, 217 F.3d 1072, 1077 (9th Cir. 2000); *see also* H.R. Rep. No. 95-595, at 367 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 (Congress did not intend the Bankruptcy Code to "expand the debtor's rights against others more than they exist at the commencement of the case"); *Moody* v. *Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984) ("[W]hatever rights a debtor has in property at the commencement of the case continue in bankruptcy — no more, no less.").

As explained below, Alpine's bankruptcy estate does not include Alpine's previously held licenses to use certain radio spectrum because those licenses automatically canceled for non-payment on August 1, 2002, six years before Alpine filed its bankruptcy petition.

A. FCC Regulations And The Terms of Alpine's Licenses Plainly State That If A Licensee Fails To Satisfy Its Payment Obligations, Its License Will Automatically Cancel

From the inception of the installment payment program in 1994, FCC rules have conditioned the grant of licenses upon the full and timely performance of payment obligations, and have provided that, upon a licensee's failure to make a required installment payment, the license will automatically cancel. *See* JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *2); 47 C.F.R. § 1.2110(g)(4) (2001) ("A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of [the entity's] payment obligations under the installment plan."); *id.* § 1.2110(g)(4)(iv) (stating that if a licensee fails to meet its payment obligations, its license "will automatically cancel"); 47 C.F.R. § 1.2110(f)(4)(1998); 47 C.F.R. § 1.2110(e)(4) (1994). The Commission imposed this condition pursuant to its authority under the Communications Act in order to further the competitive bidding system it established for assigning spectrum licenses. *See In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 52 (2d Cir. 1999) (FCC's "'payment in full' requirement has a regulatory purpose [:] 'deter[ring] frivolous or insincere bidding'" (quotation citation omitted)).

Consistent with the plain regulatory language, the FCC has consistently interpreted its regulations to mean that if licensees fail to meet payment deadlines (as

extended by applicable grace periods), the licenses automatically cancel without further FCC action. *See In the Matter of Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, 14 FCC Rcd 6080 (April 2, 1999) (affirming FCC's determination that licenses will automatically cancel if a payment deadline is missed); *In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, 13 FCC Rcd 22071 (Oct. 29, 1998) (finding that licensees failing to make payment deadlines were subject to automatic cancellation of the licenses).

The automatic cancellation rule was also reiterated in the terms of Alpine's licenses, which "condition[] [the licenses' existence] upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the Licensee." JA __, __ (Licenses at 2). The licenses specifically stated, "Failure to comply with this condition will result in the automatic cancellation of this authorization." JA __, __ (Licenses at 2). Likewise, the Security Agreements provided that, in the event of default, "the License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110," JA __, __ (Security Agreements at ¶ 8(a)), and Alpine "acknowledge[d]" in its Notes that the licenses were "conditioned upon full and timely payment of financial obligations under the

Commission's installment payment plan, as set forth in the then-applicable orders and regulations of the Commission," JA __, __ (Notes at 3). Since 1997, the FCC has provided licensees with two 90-day (or calendar quarter) automatic grace periods to catch up on late installment payments, at the end of which the license will automatically cancel if the licensee has still failed to satisfy its payment obligations. *See* 47 C.F.R. § 1.2110(g)(4)(iv).

In accordance with the relevant regulatory provisions and language in the license documents, this Court has recognized that when a licensee fails to meet its payment obligations by the end of the two automatic grace periods, its licenses are automatically canceled. *Morris Communications, Inc.* v. *FCC*, 566 F.3d 184, 192 (D.C. Cir. 2009) (observing that, upon a wireless licensee's failure to make installment payments by the end of the two 90-day grace periods, its licenses lapsed); *Celtronix Telemetry, Inc.* v. *FCC*, 272 F.3d 585, 586 (D.C. Cir. 2001) (explaining that "[a]ny licensee failing to make payment after 180 days delinquency . . . would then be in default"). Here, Alpine stopped making installment payments on those licenses in January 2002 and failed to pay its overdue installments by July 31, 2002, the last day of the second automatic grace period. Accordingly, its licenses automatically canceled on August 1, 2002, and thus did not become property of the bankruptcy estate under section 541 of the Bankruptcy Code.

Alpine argues that notwithstanding the automatic cancellation rule, and notwithstanding the fact that Alpine has made no installment payments since 2001, it nevertheless retained possession of its licenses when it filed its bankruptcy petition. Specifically, Alpine claims that its request for waiver of the automatic cancellation rule — which it filed the day before cancellation — prevented cancellation from occurring.[1] Alpine bases this contention on the following language from each of the Notes:

> A default under this Note ("Event of Default") shall occur upon any or all of the following: a. non-payment by Maker of any Principal or Interest on the due date as specified hereinabove if the Maker remains delinquent for more than 90 days and (1) Maker has not submitted a request, in writing, for a grace period or extension of payments, if any

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[1] As noted in the Factual Background, *see supra* p. 17, Alpine also filed a restructuring request with the FCC on July 24, 2002, and then filed a revised request on July 29, 2002. JA __-__ (Request for Restructuring of Debt (July 29, 2002), Bankr. Ct. Docket #27). Because the argument section of Alpine's Opening Brief relies only on the automatic cancellation waiver request, *see* Alpine Opening Br. at 18 (referring in the first sentence only to the automatic cancellation waiver request); *id.* at 19-37 (discussing only waiver requests under 47 C.F.R. § 1.925 and making no mention of restructuring requests under 31 § C.F.R. 902.2) , we have focused our response on that request as well. We note, however, that the government's explanation regarding why the automatic cancellation waiver request did not toll automatic cancellation, *see supra* pp. 25-41, is equally applicable to the restructuring request. Moreover, the FCC denied the restructuring request on January 30, 2004 and Alpine did not seek further review of that request. JA __-__ (Letter from FCC Office of General Counsel to Alpine President Robert Broz (Jan. 30, 2004), Bankr. Ct. Docket #34). Accordingly, even under Alpine's tolling theory, the restructuring request has no bearing on this case because it was no longer pending at the time Alpine filed its bankruptcy petition.

> such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission; or (2) Maker has submitted a request, in writing, for a grace period or extension of payments, if any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission, and following the expiration of the grant of such grace period or extension or upon denial of such a request for the grace period or extension, Maker has not resumed payments of Interest and Principal in accordance with the terms of this Note . . . .

JA __ - __, __ - __ (Notes at 2-3). Alpine asserts that because it had requested that the Commission reconsider its denial of Alpine's request for waiver of the automatic cancellation rule, and that request remained pending when Alpine filed for bankruptcy, the licenses were still in effect at the time of the bankruptcy petition. Alpine Opening Br. at 19-36.

That argument fails. First, as we explain below, *see infra* pp. 35-39, a request for waiver of the automatic cancellation rule is not equivalent to a request for a "grace period or extension of payments." Second, even if Alpine's waiver request could be so construed, no "such grace period or extension of payments [was] provided for in the *then-applicable* orders and regulations of the Commission." JA __-__, __-__ (Notes at 2-3) (emphasis added). As the bankruptcy court explained, at the time that Alpine stopped making installment payments, the applicable regulation, 47 C.F.R. § 1.2110(g)(4)(iv), "made clear" that a licensee would be provided with two automatic grace periods, and once those grace periods passed without payment, the licensee

"shall be in default" and "its license shall automatically cancel." JA __ (Bankr. Op. at 6); *see also* JA __ (Stay Denial Order, 23 FCC Rcd at 10489-10490) (explaining that the plain language of the Notes belies Alpine's assertion that its waiver request tolled default of its licences). Accordingly, the conditional threshold of the provision on which Alpine relies was not satisfied.

B. The FCC's Grace Period Order Plainly States That If A Licensee Fails To Make The Required Payments By The Expiration Of The Two Automatic Grace Periods, Its License Will Automatically Cancel

In its Opening Brief, Alpine attempts to avoid the plain language of the Notes and 47 C.F.R. § 1.2110(g)(4)(iv). First, Alpine notes that prior to adopting two automatic grace periods in the 1997 Grace Period Order, the Commission granted individual grace periods to licensees on a case-by-case basis. Accordingly, Alpine asserts, it was entitled not only to two automatic grace periods under section 1.2110(g)(4)(iv), but also to obtain additional grace periods via the "pre-existing" individualized grace period request process. Alpine Opening Br. at 20-22. As an initial — and, indeed, dispositive — point, that argument fails because when the agency revised its rules in 1997, it revoked section 1.2110(e)(4)(ii), the regulatory provision that previously provided for individualized grace period requests. *See* 47 C.F.R. § 1.2110(e)(4)(ii) (1994). Indeed, in the Grace Period Order, the Commission specifically explained that the new automatic grace period provisions were intended

to replace section 1.2110(e)(4)(ii)'s individualized grace period request process. *See* JA __ (Grace Period Order, 13 FCC Rcd at 436) ("From this point forward, *instead of considering individual grace period requests*, the following system will apply . . ." (emphasis added)); *see generally* JA __-__ (Grace Period Order, 13 FCC Rcd at 434-42) (contrasting the previous individualized grace period request process with the new automatic grace period rule). This Court has also recognized that the Grace Period Order "*replaced* the possibility of two (or maybe more) three-month grace periods, available only on a successful appeal to the Commission's discretion, with the assurance of two 90-day periods . . . ." *Celtronix Telemetry*, 272 F.3d at 589 (emphasis added).

The Grace Period Order also reiterates again and again that, under the revised rules, if a licensee fails to make the required payment prior to the expiration of the two automatic grace periods, its license will "automatically cancel . . . without further action by the Commission." JA __ (Grace Period Order, 13 FCC Rcd at 437); *see also* JA __, __, __ (Grace Period Order, 13 FCC Rcd at 438, 441, 442); *Morris Communications*, 566 F.3d at 192 (recognizing that under the regulatory framework promulgated via the Grace Period Order, a license will "lapse[]" if the licensee fails to make installment payments by the end of the two automatic grace periods); *Celtronix Telemetry*, 272 F.3d at 586 (under the Grace Period Order, a licensee failing

to satisfy its payment obligations by the end of the two automatic grace periods "would be in default"). Nowhere in the Grace Period Order does the Commission suggest that licensees will be able to toll automatic cancellation by filing an individual request for waiver of automatic cancellation following the expiration of the two automatic grace periods established by the new rules. To the contrary, the Order specifically provides that cancellation is tolled only by grace period requests that were *already pending* when the new rules went into effect:

> [B]ecause *from this point forward* a licensee's taking advantage of our late payment provisions will be an administrative matter processed by the Commission's loan servicer, and not a formal waiver request, aside from instances where a licensee is declared in default, there will be no public notice of a licensee's payment status. *The license is canceled automatically under such circumstances*. *In contrast*, for licensees who have *previously filed* grace period requests consistent with our current rules and procedures, we will continue our current practice of making the request public when a decision in released . . .[S]uch licensees are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests. Licensees whose requests for a grace period are denied will have ten (10) business days to make the required payment or be considered in default.
>
> JA __-__ (Grace Period Order, 13 FCC Rcd at 441-42) (emphasis added).

Alpine argues, with selective quotations from the passages above, that the Commission intended its practice of reviewing individual grace period requests to continue "without modification." Alpine Opening Br. at 21-24. But the frivolousness of that argument is self-evident: the paragraph plainly states that default will be tolled

pending agency action only for "previously filed grace period requests," and that this exception is "in contrast" to the late payment provisions that will apply "from this point forward." JA __-__ (Grace Period Order, 13 FCC Rcd at 441-42). Indeed, this Court has expressly acknowledged this point, explaining in *Celtronix Telemetry*, 272 F.3d at 588, that "the Commission indisputably intended its new grace period rule to apply to payment delays occurring after the rule's adoption but in connection with previously issued licenses." Given that Alpine ceased making installment payments in 2002, more than four years after the revised rules went into effect, it cannot plausibly argue that its request for waiver of automatic cancellation constitutes a "previously filed grace period request" subject to the pre-1997 individual grace period request process.

Alpine also suggests that the individual grace period request process "was preserved without modification" pursuant to the following sentence in the Grace Period Order: "[B]ecause we adopt our proposals providing for automatic grace periods, we do not envision licensees filing grace period requests under normal circumstances from this point forward." JA __ (Grace Period Order, 13 FCC Rcd at 441); Alpine Opening Br. at 21-23. Alpine asserts that it filed a "unique" waiver request, suggesting that such a waiver request was not contemplated by the Grace Period's reference to "normal circumstances." With that premise, Alpine argues that

it was entitled to take advantage of the pre-1997 rule tolling cancellation pending the agency's response to a grace period request. *See* Alpine Opening Br. at 21-22. Needless to say, nothing in the quoted language (or, for that matter, anywhere else in the Grace Period Order) suggests that licensees who claim to be filing "unique" waiver requests can thereby unilaterally avoid the effect of the automatic cancellation rule.

C. Alpine Has Failed To Provide Any Basis For Its Claim That Automatic Cancellation Is Tolled By A Pending Request For Waiver Of Automatic Cancellation Pursuant To The Commission's General Waiver Authority

As explained above, when the Commission adopted the Grace Period Order in 1997, it simultaneously revoked section 1.2110(e)(4)(ii), the regulatory provision that previously entitled licensees to request individualized grace periods. *See supra* pp. 31-35. Alpine argues, however, that it successfully delayed automatic cancellation of its licenses by filing a request for waiver of the automatic cancellation rule pursuant to 47 C.F.R. § 1.925, a provision generally allowing licensees to request waivers of any rules relating to wireless radio service applications. Alpine Opening Br. at 23. This argument confuses individualized "grace period requests" (which, under the pre-1997 grace period rule, 42 C.F.R. § 1.2110(e)(4)(ii), tolled future payments pending the FCC's response to the request) and a request for waiver of an FCC rule pursuant to the FCC's general waiver authority. Under the Notes, default is delayed only by a pending "request . . . for a grace period or extension of payments" where "such grace

period or extension of payments is provided for in the then-applicable orders and regulations." JA __-__, __-__ (Notes at 2-3). As the bankruptcy court explained, "[a]lthough [under section 1.925,] the FCC retained the authority in appropriate circumstances to grant a waiver of its rules, including the automatic cancellation rule, that authority is not the same as an order or regulation providing for grace periods or extensions of the time for payments." JA __ (Bankr. Op. at 7).

A request for a waiver of the automatic cancellation rule does not suspend operation of the rule unless and until such a waiver request is granted. Indeed, it is a basic point of statutory interpretation that a general provision does not trump a specific one, *see, e.g.*, *United States* v. *Paddack*, 825 F.2d 504, 514 (D.C. Cir. 1987), and section 1.2110(g)(4)(iv) could not be more specific about the consequences of failing to make installment payments: after the two automatic grace periods have passed, the licensee "shall be in default" and "its license shall automatically cancel." Simply put, Alpine cannot point to any textual basis for its assertion that the pendency of a waiver request under section 1.925 precludes automatic cancellation under section 1.2110(g)(4)(iv).

The FCC has likewise consistently treated requests for waiver of the automatic cancellation rule as requests for relief from the operation of a rule that has already occurred. In those instances where the FCC has determined that granting a waiver is

appropriate, the FCC has granted the waiver *nunc pro tunc*. *See, e.g.*, *In the Matter of Big Sky Wireless Partnership*, 21 FCC Rcd 10066, 10073 (Sept. 11, 2006) (explaining that the license at issue had automatically canceled at the end of the two automatic grace periods, and that waiver of the automatic cancellation rule would be granted *nunc pro tunc*); *In the Matter of Advanced Communications Solutions, Inc.*, 21 FCC Rcd 1627, 1627 (Feb. 17, 2006) (same); *In the Matter of Leaco Rural Telephone Cooperative, Inc.*, 21 FCC Rcd 1182, 1182-83 (Feb. 3, 2006) (same); *see also, e.g.*, *In the Matter of CommNet Communications Network, Inc.*, 22 FCC Rcd 8612, 8616 (May 9, 2007) (observing that the license at issue had already automatically canceled); *In the Matter of Allen Leeds*, 22 FCC Rcd 1508, 1508 (Jan. 29, 2007) (same); JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *21) (same); JA __ (Waiver Denial Order, 22 FCC Rcd at 1495) (same).

Moreover, as the FCC recognized in responding to Alpine's similar argument in the administrative proceedings, enforcement of the rule itself would be undermined if merely filing a request for a waiver delayed or forestalled its enforcement. This is particularly the case with the automatic cancellation rule, which the FCC has said will be strictly enforced in order to effectuate the purposes of the installment payment program. *See* JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *21) ("If it were otherwise — if installment payors could toll their payment

deadlines simply by filing waiver requests — such requests would long ago have become the norm, eviscerating the Commission's enforcement of the automatic cancellation rule and defeating the underlying purpose of the rule, which, we repeat, is to encourage potential licensees to bid only what they can pay and then, if they win, to make all their payments on time"). The FCC's treatment of waiver requests as seeking retroactive restoration of already canceled licenses is entitled to deference by the courts. *See NetworkIP, LLC* v. *FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008) ("The FCC's interpretation of its own orders and rules is entitled to substantial deference, just as an agency's interpretation of one of its own regulations commands substantial judicial deference." (internal quotation omitted)); *see also Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of its own regulations must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation).

Alpine also argues that because the Commission has in some cases relied on its authority under section 1.925 to grant requests to waive the automatic cancellation rule, the agency acted arbitrarily and capriciously in rejecting Alpine's request for similar waivers. *See* Alpine Opening Br. at 28-33. These arguments plainly belong only in Alpine's administration challenge under 47 U.S.C. § 402(b) and are outside the scope of this bankruptcy appeal. *See supra* pp. 3-5. It is sufficient here to point

out that Alpine never made a further installment payment after filing its request for a waiver. As the FCC observed in its Reconsideration Denial Order, "the Commission has never granted a waiver of the automatic cancellation rule where a party has ceased making post-default payments towards its outstanding debt obligation." *See* JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *9). Alpine was treated the same as other similarly situated applicants.

D. Alpine Had No Reason To Believe That Its Licenses Were Not Subject To The Automatic Cancellation Rule

Alpine complains that, given that it requested waiver the day before automatic cancellation of its licenses was scheduled to occur, it "had every reason to assume" that the automatic cancellation rule would not be applied to its licenses. Alpine Opening Br. at 30. Certainly, a debtor's confusion over the law cannot create property of the estate where none existed. If relevant at all, this argument goes to the reasonableness of the FCC's decisions denying Alpine's request for waiver of the automatic cancellation rule, which is outside of the jurisdictional scope of this bankruptcy case. *See supra* p. 3-5. It is also belied, in any event, by the plain language of the Notes, the Security Agreements, the Licenses, the Grace Period Order, and section 1.2110(g)(4)(iv), which, as explained above, made more than clear that a licensee's failure to make installment payments by the end of the six month grace

period would result in automatic cancellation, and gave no indication that a licensee could delay cancellation simply by filing a waiver request at the last minute. *See supra* pp. 26-39. Moreover, Alpine was informed that the Commission had denied its request for waiver of the automatic cancellation rule more than 18 months prior to Alpine's bankruptcy petition and the auction for new licenses to use the spectrum previously licensed by Alpine. JA __ (Waiver Denial Order, 22 FCC Rcd at 1492). In short, there is no basis for Alpine's claim that it was harmed by "uncertainty or doubt concerning the tolling of the FCC's automatic cancellation rule." Alpine Opening Br. at 31-32.

Relatedly, Alpine suggests that, under contract law, any ambiguities in the relevant provisions of the Note "must be read to Alpine's advantage." Alpine Opening Br. at 35. But this is not a contract case. The question of automatic cancellation is a regulatory matter as to which the FCC's views are not subject to challenge in this case and are entitled to deference in Case No. 10-1020. In any event, as explained above, both the terms of Alpine's licenses and the FCC's rules clearly preclude Alpine's position in this case, and as such, there are no ambiguities that this Court need resolve even if contract principles were to apply. *See Mesa Air Group* v. *Department of Transportation*, 87 F.3d 498, 503 (D.C. Cir. 1996) ("Where the language of a contract is clear and unambiguous on its face, a court will assume that the meaning ordinarily

ascribed to those words reflects the intentions of the parties."); *see also id.* at 506 (observing that as an interpretive rule, *contra proferentem* is used only as a last resort absent other indications of the parties' intent).

Moreover, Alpine's challenge does not even turn on any contractual language — nowhere in its Opening Brief does Alpine dispute that the Notes provide for tolling of default only if a "grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission." JA __-__, __-__ (Notes at 2-3). Instead, Alpine argues that it suspended automatic cancellation by filing a waiver request because the "then-applicable orders and regulations" did in fact provide for additional grace periods or extension of payments. Alpine Opening Br. at 19-36. Accordingly, the question is whether the Commission has properly interpreted its own orders and rules, an inquiry in which the Commission receives substantial deference. *See supra* p. 24.

II. The Bankruptcy Code's Automatic Stay Provision Has No Application To The Challenged Auction

The FCC has responsibilities under the Communications Act to auction wireless telecommunications licenses in such a manner as to "protect the public interest in the use of the spectrum," and to promote certain policy objectives, including development and deployment of new technologies, promoting economic opportunity and

competition, recovery of a portion of the value of the public spectrum made available for commercial use, and efficient and intensive use of the spectrum. *See* 47 U.S.C. § 309(j). Alpine fails to demonstrate that in scheduling the challenged auction more than six years after Alpine's licenses canceled, the FCC sought to fulfill these responsibilities prematurely or in violation of the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362.

A. The Automatic Stay Is Not Violated By The Disposition Of Property In Which The Debtor Ceased To Have Any Interest Prior To Filing For Bankruptcy

As explained earlier, the filing of a bankruptcy petition creates an estate comprised of "all legal or equitable interests of the debtor in property *as of the commencement of the case*." 11 U.S.C. § 541(a)(1) (emphasis added). The Bankruptcy Code's automatic stay applies to "any act to obtain possession of property *of the estate* or of property *from the estate* or to exercise control over property *of the estate* . . . ." *Id.* § 362(a)(3) (emphasis added). Accordingly, bankruptcy courts have consistently recognized that the automatic stay is not violated by post-petition disposition of property in which the debtor has ceased, as of its petition date, to have any interest. *See, e.g.*, *In re Mellino*, 333 B.R. 578, 586-87 (Bankr. D. Mass. 2005); *In re Brettschneider*, 322 B.R. 606, 610 (Bankr. D. S.C. 2005); *In re Longmire*, 311 B.R. 203, 205 (Bankr. S.D. Ohio 2003); *In re Kingsport Ventures, L.P.*, 251 B.R. 841,

849 (Bankr. E.D. Tenn. 2000); *In re Alcom America Corp.*, 156 B.R. 873, 876, 882, 884 (Bankr. D. D.C. 1993). This principle has been applied to licenses of various forms, including those issued by the FCC. In a directly analogous case, a bankruptcy court in New York held that pre-petition automatic cancellation under section 1.2110(f)(4) precluded a debtor's argument that the canceled licenses were property of the estate. *See In re Personal Communications Network*, 249 B.R. 233, 237 (Bankr. E.D.N.Y. 2000) (where FCC "[l]icenses hav[e] cancelled prepetition, [the debtor] brought no ownership rights in respect of the Licenses to the bankruptcy estate"); *see also, e.g.*, *In re Yachthaven Restaurant, Inc.*, 103 B.R. 68, 74-76 (Bankr. E.D.N.Y. 1989) (governmental license canceled pre-petition because license conditions, including payment condition, were not satisfied); *In re Edwin M. Lipscomb Farms*, 90 B.R. 422, 424 (Bankr. W.D. Mo. 1988) ("[I]f the agreement is cancellable by the terms contained therein and one of the parties properly initiates such cancellation prepetition and nothing more remains to be done except wait for the passage of time, the mere filing of a petition for relief neither halts nor stays the cancellation.") (*citing Moody* v. *Amoco Oil Co.*, 734 F.3d 1200, 1214 (7th Cir. 1984).

As the bankruptcy court in this case correctly observed, the Supreme Court's decision in *FCC* v. *NextWave Personal Communications Inc.*, 537 U.S. 293 (2003), does not suggest otherwise. JA __-__ (Bankr. Op. at 9-10). There, the debtor filed a

petition for bankruptcy *before* the deadline by which its installment payments needed to be made. *See NextWave*, 537 U.S. at 297 (NextWave's bankruptcy petition filed June 8, 1998, nearly five months prior to October 29, 1998 date by which it was required to resume installment payments). Unlike the debtor in *NextWave*, Alpine filed its bankruptcy petition six years after the automatic cancellation of its licenses, and approximately 19 months after the Commission denied its request for waiver for automatic cancellation. Subsequent to cancellation of its licenses, Alpine's only remaining license-related rights consisted of rights to pursue various administrative appeals. Alpine availed itself of that opportunity, and the bankruptcy court correctly recognized that the Commission did not interfere in any way with Alpine's pursuit of those rights. JA __ (Bankr. Op. at 8).

B. The Challenged Auction Is Not An Act To Enforce A Lien Or Collect A Claim Against Alpine

Alpine also argues that the auction constituted an attempt by the FCC to "create, perfect, or enforce" a lien, in violation of sections 362(a)(4) and (5) of the Bankruptcy Code's automatic stay provision. Alpine claims that the auction "was nothing more than a foreclosure on [the FCC's] collateral under the terms of the Security Agreement in violation of these Bankruptcy Code provisions." Alpine Opening Br. at 36-37.

Alpine is mistaken. This case turns on the effect of pre-petition license cancellation, which occurred pursuant to established regulatory mechanisms. Cancellation is distinct from foreclosure or other enforcement of a security interest, and carries very different consequences. Federal law is clear: Cancellation terminated the licenses — they no longer existed once canceled. *See NextWave*, 537 U.S. at 307-08 (distinguishing between "the enforcement of [a security] interest in the bankruptcy process" and "elimination of the licenses through the regulatory step of 'revoking' them" (footnote omitted)). Following cancellation, Alpine had no further rights to use the wireless spectrum — and section 301 of the Communications Act is unambiguous that no one could obtain a property interest in the underlying spectrum. *See supra* pp. at 8-9. As the Ninth Circuit explained in *In re Magnacom Wireless, LLC*, 503 F.3d 984, 990 (9th Cir. 2007), "under the plain language of the statute and applicable regulations, once an FCC license is canceled, a licensee no longer has any right derived from that license." Accordingly, a former licensee has no rights in connection with a subsequent auction of licenses to use the same spectrum. *Id.* at 992 (citing 47 U.S.C. § 307(a)).

More specifically, *Magnacom* refutes Alpine's argument that the cancellation of a license and issuance of a new license to use the same portion of spectrum is an effective foreclosure upon and sale of the earlier license. The Ninth Circuit explained,

"[a] lawful extinction of a property right . . . does not give the trustee in bankruptcy rights to other property created by that creditor." 503 F.3d at 992. If the law were otherwise, every previous licensee who once had authorization to use particular spectrum could challenge the FCC's issuance of a subsequent license for that spectrum.

Cancellation of the licenses in 2002 extinguished them. The new licenses that the Commission may issue to the auction's winning bidders will involve a different bundle of rights (e.g., license termination date, construction deadlines, and payment terms) from the now-canceled licenses. *See, e.g.*, 47 C.F.R. § 24.15 (license period); *id.* § 24.203 (construction requirements). Moreover, because the rights to use spectrum exclude any property right in the underlying spectrum pursuant to the Communications Act, no legally meaningful link exists between Alpine's canceled licenses and those at issue in the auction.

Alpine attempts to impute significance to *Magnacom*'s recognition that under *NextWave*, a debtor's bankruptcy petition normally prevents the FCC from unilaterally canceling the debtor's licenses, at least where the debtor's bankruptcy petition was filed before automatic cancellation.[2] Alpine Opening Br. at 43 (citing *Magnacom*, 503

[2] In *Magnacom*, the licenses were canceled pursuant to a bankruptcy court order lifting the automatic stay (which the debtor did not oppose). *Magnacom*, 503 F.3d (continued...)

F.3d at 991). That argument cannot avail Alpine, for the same reason that Alpine gains nothing from *NextWave*: unlike Alpine, the debtor in *Magnacom* filed its bankruptcy petition *before* its licenses canceled, meaning that the licenses were part of the bankruptcy estate and subject to the automatic stay. *See supra* pp. 43-44.

Alpine also appears to question *Magnacom* on the ground that *NextWave* circumscribes the FCC's authority to regulate spectrum under 47 U.S.C. § 301 and provides some form of ownership rights to licensees. Alpine Opening Br. at 43-44. This Court has already recognized, however, that section 301 allows the FCC to condition licenses upon full and timely payment, so that the licenses themselves lapse when the licensee fails to make its installment payments by the end of the second grace period. *See Morris Communications, Inc.* v. *FCC*, 566 F.3d 184, 192 (D.C. Cir. 2009).

Moreover, the FCC has also made clear that cancellation of a license is not equivalent to foreclosure or any other enforcement of a security interest in the licenses. In 1996, the FCC's General Counsel and Wireless Bureau Chief explained in a joint opinion letter the difference between cancellation and foreclosure:

> In the case of FCC licenses that are canceled and reauctioned, however, there is no liquidation of the collateral by the FCC and no proceeds from

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[2](...continued)
at 991.

> the resale of the defaulted license because the license is canceled and, in effect, disappears. The Commission would be simply auctioning another initial license to use the same spectrum to another entity, not transferring the original license.

Leonard J. Kennedy, Esq., 11 FCC Rcd at 21576.[3] In other words, once an FCC license is canceled, the license ceases to exist, as does any interest of the former licensee in use of the underlying spectrum. Even apart from the governing federal legal scheme, the FCC's position comports with common sense. For example, an owner of real or personal property may confer limited rights to use that property — such as by a lease or easement — and may subject such an agreement to a requirement of timely payment. If the user fails to comply with the terms (by failing to make timely payment), and the property owner cancels the agreement, the defaulting party would have no further rights to use the property. A subsequent lease or easement to a new user would not be a transfer of the prior user's interest, but a creation of a new set of rights. If changed market conditions dictated a higher price for the new lease

[3] Alpine's Opening Brief appears to suggest that *Leonard J. Kennedy, Esq.* supports Alpine's position that its request for waiver of the automatic cancellation rule tolled automatic cancellation pending resolution of the request. Alpine Opening Br. at 40-41. Among other reasons, this argument fails because the FCC issued *Kennedy* in 1996, prior to the 1997 Grace Period Order which adopted the grace period rules that were in effect at the time that Alpine stopped making installment payments. *See supra* pp. 31-35.

or easement, the prior user (who defaulted, and whose rights terminated) would not be entitled to receive any additional amount charged by the property owner.

To be sure, in a typical commercial arrangement, the property owner would not likely obtain a security interest in the lease or easement or its proceeds, as the FCC did here. However, the FCC's policy objectives, and the unique nature of a spectrum license, required the FCC to take a different approach. At the direction of Congress, the Commission sought to encourage small businesses to become telecommunications entrepreneurs, and to that end permitted licensees to seek financing by granting a security interest in the proceeds of a sale of a license to third parties (consistent with FCC practices). *See MLQ Investors, L.P.* v. *Pacific Quadracasting, Inc.*, 146 F.3d 746 (9th Cir. 1998). To assure that the FCC would have priority ahead of other creditors in any proceeds from the sale of the license, the agency took a prime security interest in the license and its proceeds, restricting others to only a secondary security interest. *See Leonard J. Kennedy, Esq.*, 11 FCC Rcd at 21572. However, because the licenses provided the FCC with its security for Alpine's indebtedness, the Security Agreement had effect only while the licenses were in existence. The Security Agreements made clear that the primary and secondary creditor rights conveyed in the agreements did not override the FCC's regulatory rights to cancel the licenses for a regulatory

violation, including payment default.[4] JA __, __, __, __ , __, __ (Security Agreements at ¶¶ 2, 3, 8).

The Communications Act specifically states that a licensee has no property right to the underlying radio spectrum. The statute authorizes only "the use of such channels [of radio transmission, or spectrum], but not the ownership thereof." 47 U.S.C. § 301. The statute also emphasizes that a licensee obtains only limited rights, defined by the license itself and the FCC's regulations: "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." *Id.* The terms and conditions of the licenses here expressly provided for cancellation, and also were expressly conditioned on full and timely payment of installments. Once those licenses ceased to exist, Alpine had no further rights in them.[5]

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[4] Alpine has attached to its Opening Brief a set of U.C.C. financing statements filed by the FCC, which Alpine suggests are "highly relevant" to this appeal. Alpine Opening Br. at 13 n.2, Appendix B. As Alpine acknowledges, it failed to raise this argument before the bankruptcy court, and therefore the record is silent on why the FCC filed these statements. In any event, it is settled law that a creditor cannot create security where the putative collateral does not exist simply by making a U.C.C. filing. *See* D.C. Code § 28:9-504, Official Comment 2 (2001) ("[A] financing statement has no effect with respect to property indicated but to which a security interest has not attached."); D.C. Code § 28:9-203 (2001) (grant of a security interest does not attach unless debtor has interest in collateral).

[5] Alpine does not argue on appeal that section 525 of the Bankruptcy Code (continued...)

As a final matter related to the new auction, it appears that Alpine seeks an order from this Court that the FCC must credit the proceeds of the challenged auction against the remaining debt on Alpine's canceled licenses. Alpine Opening Br. at 45–46. That request is not properly before this Court. The issue on appeal is whether the bankruptcy court correctly denied Alpine's emergency motions seeking a declaration that the automatic stay of 11 U.S.C. § 362(a) barred the FCC from proceeding with the auction. *See* JA __ (Bankr. Op. at 2). Indeed, consideration of this issue would be premature because as of yet there are no proceeds to speak of: the administrative proceeding which will determine whether the FCC will issue licenses to the winning bidder of that spectrum has not yet concluded because, among other things, Alpine has challenged (before the FCC) the right of the winning bidder to receive licenses for the use of that spectrum. In any event, Alpine's assertion that the bankruptcy court's decision allows the government to obtain a double recovery is false. The amount of the FCC's unsecured claim in Alpine's bankruptcy (approximately $40 million, *see* Alpine Opening Br. at 47) far exceeds the amount of

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[5](...continued)
precluded automatic cancellation in 2002, and rightly so. As the bankruptcy court explained, section 525 applies to "a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated . . . ." It does not purport to restrict governmental action for entities that may in the future become a debtor under the Code. JA __ (Bankr. Op. at 9).

the winning bids for new licenses to use spectrum formerly licensed to Alpine (approximately $5 million, *see id.* at 15-16). The evident shortage of Alpine's non-license assets and likely claims of Alpine's non-FCC creditors make it extremely unlikely that the FCC will be able to recover much of its claim against Alpine. Alpine's assertion that the government is going to receive twice its claim thus is unsupported and unsupportable.

To the extent the Court is interested in the issue, the government notes that while Alpine has no right as a matter of law to claim an offset from the proceeds of the auction, the Commission has expressed its policy judgment, based on principles of equity, that the government will "forgive any outstanding debt so long as it has been made whole (penalties and costs included) in a subsequent auction." *See Leonard J. Kennedy, Esq.*, 11 FCC Rcd at 21576 (cited in *Magnacom*, 503 F.3d at 995-96). Until the amount of the FCC's claim is resolved under that policy, Alpine's arguments are premature.

III. Alpine's Remaining Arguments Are Not Properly Before This Court And, In Any Event, Lack Merit

As a last resort, Alpine argues that the bankruptcy court erred in failing to declare the Notes invalid on the ground that "there was no 'meeting of the minds' between the parties with respect to essential, material contract terms," and that the terms of the installment payments were unconscionable. Alpine Opening Br. at 46-50.

Alpine neither requested such relief in its emergency motions nor presented this argument to either the bankruptcy court or the district court and, as such, the issue of the Notes' validity is not properly before this Court. *See, e.g.*, *United States* v. *Hylton*, 294 F.3d 130, 135 (D.C. Cir. 2002) ("For decades, we have emphasized that an argument not made in the lower tribunal is deemed forfeited and will not be entertained absent exceptional circumstances." (internal quotation omitted)).

In any event, for the reasons explained in Part I, Alpine cannot substantiate its claim that it was legitimately unaware that its failure to comply with its payment obligations would result in automatic cancellation of its licenses. From the beginning of the installment payment program in 1994, FCC rules have clearly stated that, upon a licensee's failure to make required installment payments, the license will automatically cancel, and the FCC has repeatedly and consistently reiterated this point in its orders, as well as in the terms of Alpine's licenses. *See supra* pp. 30-31. Alpine was also aware, or should have been aware, that the Notes it signed expressly conditioned the availability of grace periods on "then-applicable orders and regulations," which, at the time Alpine stopped making payments, provided for two automatic grace period quarters, immediately followed by automatic cancellation if the licensee had yet to satisfy its payment obligations. *See supra* pp. 26-39. Indeed, the Commission coordinated the change in the grace period rules with an offer of amnesty

or restructuring for licensees like Alpine. *See* JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *23 n. 272). Alpine, like other PCS licensees, had a choice whether to retain its licenses, restructure them, or return them for full or partial amnesty. Alpine made a knowing business decision regarding its ability to comply with the new rules.

Moreover, the two-automatic-grace-period rule is *more* generous than the individualized grace period request process that was in place at the time Alpine signed the Notes. Under the individualized request process, a licensee was not entitled to any extension of payments, and instead had "to wait for a ruling by the Commission . . . before knowing whether a grace period is granted or denied." JA __ (Grace Period Order, 13 FCC Rcd at 435). In replacing the individualized request process with a rule automatically providing licensees with 180 days to catch up on late installment payments, the Commission hoped to "add certainty to the installment payment process," JA __ (Grace Period Order, 13 FCC Rcd at 436), and to "liberalize[] its installment payment grace period rules," providing licensees with a "significant advantage[] not previously available to them," JA __ (Reconsideration Denial Order, 25 FCC Rcd 469, 2010 WL 25778, at *2); *see also* JA __ (Grace Period Order, 13 FCC Rcd at 443) ("[W]e believe that this certainty regarding the Commission's treatment of licensees needing extra time to make their installment payments will

increase the likelihood that licensees and potential investors will find solutions to capital problems before a default occurs."); *Celtronix Telemetry, Inc.* v. *FCC*, 272 F.3d 585 (D.C. Cir. 2001) (upholding, against a retroactivity challenge, the FCC's decision to replace the individualized grace period request process with two automatic grace periods). In short, Alpine's request that this Court declare the Notes void is both far afield from the issues properly presented in this case and devoid of merit.

Alpine's last argument appears to dispute whether the challenged auction could proceed pursuant to 11 U.S.C. § 362(b)(4), which exempts from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police or regulatory power." Alpine Opening Br. at 52-53. But the bankruptcy court did not rely on section 362(b)(4) in rejecting Alpine's claims — the provision is not even mentioned in the bankruptcy court's decision. Indeed, having found that the automatic stay has no application to the challenged auction, the bankruptcy and district courts had no reason to consider whether the FCC's actions would be excluded from the automatic stay pursuant to one of the exemptions enumerated in section 362(b).

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As a final matter, the government is constrained to respond to Alpine's repeated suggestions in its Opening Brief that the bankruptcy court denied its motion only

because the government somehow "misled" the court about the relevant law. *See, e.g.*, Alpine Opening Br. at 18, 19, 21. These accusations are baseless. The bankruptcy and district courts rejected Alpine's claims because Alpine failed to substantiate them. In particular, Alpine failed, and continues to fail, to cite any legal authority that supports its assertion that it successfully tolled operation of the automatic cancellation rule by filing a request for waiver the day before automatic cancellation occurred. To the contrary, the plain language of the Notes, the Security Agreements, the Licenses, the Grace Period Order, and 47 C.F.R. § 1.2110(g)(4)(iv) made more than clear that Alpine's failure to make installment payments by the end of the two automatic grace periods would result in automatic cancellation, and gave no indication that Alpine could delay cancellation simply by filing a waiver request at the last minute. Pursuant to all of these authorities, Alpine's licenses canceled on August 1, 2002, six years prior to the commencement of Alpine's bankruptcy case. As the bankruptcy court and district court correctly held, under these circumstances, Alpine has not and cannot demonstrate that the Bankruptcy Code's automatic stay has any application to the challenged auction.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a) that the foregoing brief contains 13,195 words, according to the count of Corel WordPerfect X4.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran

CERTIFICATE OF SERVICE

I certify that on April 28, 2010, I filed the foregoing brief with the Court by using the appellate CM/ECF system, and by causing eight paper copies to be delivered to the Court by hand delivery within two business days. I further certify that the following counsel are registered CM/ECF users and that service will be accomplished through the appellate CM/ECF system:

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STATUTORY ADDENDUM

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11 U.S.C. § 541

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

47 U.S.C. § 301

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.